**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2004-KA-00491-COA**

**LEON FUQUA A/K/A FUGUA LEON A/K/A LEOMIE FUQUA** — **APPELLANT**

**v.**

**APPELLEE**

**STATE OF MISSISSIPPI**

| | |
|---|---|
| DATE OF TRIAL COURT JUDGMENT: | 1/15/2004 |
| TRIAL JUDGE: | HON. W. SWAN YERGER |
| COURT FROM WHICH APPEALED: | HINDS COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | GEORGE T. HOLMES |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: SCOTT STUART |
| DISTRICT ATTORNEY: | ELEANOR JOHNSON PETERSON |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | CONVICTED OF COUNT I, CAPITAL MURDER, AND COUNT II, ARSON-SENTENCED TO SERVE A TERM OF LIFE WITHOUT PAROLE IN THE CUSTODY OF THE MDOC AS TO EACH COUNT, SAID SENTENCES TO RUN CONSECUTIVELY. |
| DISPOSITION: | AFFIRMED IN PART; REVERSED AND REMANDED IN PART- 09/13/2005 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | |

**BEFORE BRIDGES, P.J., CHANDLER, AND ISHEE, JJ.**

**ISHEE, J., FOR THE COURT:**

¶1. The appellant, Leon Fuqua, a/k/a Fugua Leon, a/k/a Leomi Fuqua, ("Fuqua"), was convicted in the Hinds County Circuit Court, Honorable Swan Yerger presiding, of the crimes of capital murder and arson. The appellant was sentenced as a habitual offender to two consecutive life terms

without possibility of parole. Fuqua now asserts numerous assignments of error on appeal. We reverse the judgment of the trial court and remand for further proceedings according to this opinion.

**FACTS**

¶2. Fuqua resided with Janis Taylor and her boyfriend, Roy Williams, on East Davis Street in the City of Jackson, Mississippi. On or about February 16, 2002, Taylor and Williams returned to the apartment to find Fuqua, his boyfriend Albert Pitts, and Ray Charles Ainsworth in the living room. Fuqua and Ray Charles Ainsworth were in the nude, and Ainsworth and Fuqua were engaged in oral sex. While engaged in the act, several witnesses came and went from the apartment.

¶3. At some point during the encounter, Leon Fuqua and Albert Pitts began to strike Ainsworth in the head with objects ranging from a lead pipe to a crowbar whenever Ainsworth failed to perform oral sex upon Fuqua. None of the witnesses attempted to call the police once the sex became violent. The constant beatings caused Ainsworth's face and head to swell severely. After an unspecified period of time, Ainsworth complained of feeling cold. Fuqua brought Ainsworth a blanket, and after checking on him, found that he had stopped breathing.

¶4. Around 6:30 a.m. on February 16, 2002, the Jackson Fire Department was dispatched to East Davis Street in the City of Jackson to respond to a house fire at an abandoned house among several abandoned houses on the street. Based on dental records, the badly burned human corpse within the house was determined to be that of Ray Charles Ainsworth. The cause of death was subsequently determined to be subdural hemorrhage and homicide. The pathologist based his findings, in part, upon witness statements provided by the district attorney.

¶5. The investigation of the Jackson Police Department led to the issuance of a search of Leon Fuqua's apartment. Subsequent to that search, Fuqua gave the police two confessions, one hand-written and one typed. According to the typed confession, Pitts and Fuqua rolled up Ainsworth's

body in a blanket, took it to the abandoned house, and set the house on fire. Leon Fuqua was convicted after a trial on the merits, and now timely appeals. Fuqua asserts the following errors on appeal: (1) whether the trial court erred by not dismissing count 1 of the indictment for lack of an essential element; (2) whether Fuqua was prevented from developing testimony in support of theories of defense; (3) whether the trail court erred in disallowing Fuqua's duress defense jury instruction; (4) whether Fuqua was impermissibly prejudiced by the admission of irrelevant evidence; (5) whether the verdict of guilty of capital murder, as opposed to manslaughter, is supported by the evidence; and (6) whether the defendant was illegally sentenced as a habitual offender.

## ISSUE AND ANALYSIS

### I. Whether the trial court erred by not dismissing Count 1 of the indictment for lack of an essential element.

¶6. We begin the discussion of this issue by noting that the issue of whether an indictment is fatally flawed is an issue of law and enjoys a relatively broad standard of review. *Steen v. State*, 873 So. 2d 155, 161 (¶21) (Miss. Ct. App. 2004). Fuqua's first assertion of error on appeal is that the trial court erred by not dismissing count 1 of the criminal indictment for lack of an essential element. Count I of the indictment charged Fuqua with the commission of capital murder under the Mississippi Code Annotated §97-3-19 (2)(e) (Rev. 2000) while engaged in the offense of sexual battery under Mississippi Code Annotated §97-3-95(1) (Rev. 2000). Under the crime of sexual battery the indictment did not specify the subsection under the code alleging the type of sexual battery charged. Sexual battery is defined under the Mississippi Code Annotated § 97-3-95, in pertinent part, as follows:

> (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
>
> (a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

(c) A child at least fourteen (14) but under sixteen (16) years of age; if the person is thirty-six (36) months older than the child.

(d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

¶7. Subsection (a) of Mississippi Code Annotated § 97-3-95(1) defines sexual battery as sexual penetration with "another person without his or her consent." The indictment of Leon Fuqua charged him with the underlying sexual battery felony for "engaging in sexual penetration with Ray Charles [sic], in that he the said Albert Lee Pitts, Jr. and Leon Fuqua forced the victim, Ray Charles Ainsworth to perform fellatio on the said Albert Lee Pitts, Jr. and Leon Fuqua." At trial Fuqua argued that since the indictment did not contain the express language "without consent," Count I of the indictment should have been dismissed. The State argued at trial that the term "force" and "without consent" were synonymous, and therefore were sufficient for the purpose of the indictment. The trial court agreed with the State and overruled Fuqua's motion.

¶8. In *Peterson v. State*, the defendant was charged with sexual battery pursuant to Mississippi Code. Annotated § 97-3-95 (Rev. 2000), and argued that the indictment was defective for failure to include the words "without her consent." *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996). In *Peterson* the supreme court stated that "it is a well-established principle of law that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged." *Peterson*, 671 So. 2d at 652-53. The requirement that all essential elements be in the indictment is predicated upon the following premise as stated in *Peterson*:

> [I]t is fundamental . . . that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; *if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient . . . . Every material fact and essential ingredient of the offense- -must be alleged with precision and certainty,* or, as has been stated, every

> fact which is an element in a prima facie case of guilt must be stated in the indictment.

*Id.* at 653 (citing *Love v. State*, 211 Miss. 606, 611, 52 So. 2d 470, 471 (1951)).

¶9. The court in *Peterson* went on to hold that "lack of consent is an essential fact necessary to constitute the crime of sexual battery." *Id.* at 655. Based upon the *Peterson* holding, Fuqua argues that the term "force" is not synonymous with the term "without consent" for the purposes of establishing the requisite clarity for criminal indictments for the crime of sexual battery. Furthermore, Fuqua argues that "force" may constitute a permissible activity when viewed in the context of consensual human sexual conduct. Fuqua likens the consensual use of force in sexual activity to the consensual use of force by parties against each other in such contact sports as football, wrestling, and boxing. Fuqua also notes that the American Psychiatric Association states that sexual masochism "[i]nvolves the act of being humiliated, beaten, bound, or otherwise made to suffer." Diagnostic And Statistical Manual Of Mental Disorders, 529 § 302.83 (Fourth Edition,1994). It is Fuqua's assertion that the three men were involved in a sado-masochistic menage a trois, and that Charles Ainsworth voluntarily engaged in the activities so graphically attested to.

¶10. Ultimately, Fuqua's argument is that the lack of specific statutory language of "without consent" left Fuqua without the ability to prepare a defense at trial. Fuqua argues that, just as in *Peterson*, "[a]s a result of the indictment's failure to allege lack of consent, . . . [the defendant] reasonably could have prepared a defense refuting a charge that [the victim] was not mentally defective while, the prosecution would have prepared a case based on [the victim's] alleged failure to give consent. Thus [the defendant] did not have the actual notice necessary to properly prepare his defense." *Peterson*, 671 So. 2d at 655.

¶11. The State argues on appeal that the Mississippi Supreme Court's decision in *Gray v. State* is controlling in regards to this issue. *Gray v. State*, 728 So. 2d 36, 42 (¶1) (Miss. 1998). The court

in *Gray* held that under Mississippi law a capital murder indictment based on an underlying felony, other than burglary, does not have to specifically set forth the elements of the underlying felony used to elevate the crime to capital murder. *Id.* at 71 (¶ 174) (citing *State v. Berryhill*, 703 So. 2d 250 (¶24) (Miss. 1997)).

¶12. It would seem that the use of the crime of sexual battery as an underlying felony for murder falls squarely into the legal void created between the *Peterson* case, which requires that lack of consent be alleged with specificity, and *Gray*, which requires the specific inclusion of the elements of an underlying of felony in a felony murder indictment only for the crime of burglary. After examining the supreme court's rationale for the two decisions, we today hold that the short list of underlying felonies requiring essential elements of the crime in the indictment must be expanded to include sexual battery.

¶13. An examination of *Berryhill*, a prominent basis of the decision in *Gray*, is illuminating in explaining our rationale. In *Berryhill*, the Mississippi Supreme Court stated that "the level of notice that would reasonably enable a defendant to defend himself against a capital murder charge that is predicated upon burglary must, to be fair, include notice of the crime comprising the burglary. Burglary is unlike robbery and all other capital murder predicate felonies in that it requires as an essential element the intent to commit another crime. " *Berryhill*, 703 So. 2d at 256 (¶24). In arriving at this legal conclusion our supreme court relied upon United States Supreme Court precedent that holds that an indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him is defective although it may follow the language of the statute. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

¶14. The Mississippi Supreme Court held in *Peterson* that the indictment, much like that of the indictment before us today, was fatally flawed for lack of the element of "without consent" and thus

failed to give the requisite notice to the defendant in order to prepare his defense. This point is crucial as "the ultimate test, when considering the validity of an indictment on appeal, is whether the defendant was prejudiced in the preparation of his defense." *Medina v. State*, 688 So. 2d 727, 730 (Miss. 1996). Our supreme court specifically warned of the confusion and prejudice that may arise from the lack of this term, and in its wisdom gave special consideration to the crime of sexual battery. In *Gray*, the supreme court stated that "the level of notice that would reasonably enable a defendant to defend himself against a capital murder charge that is predicated upon burglary must, to be fair, include notice of the crime comprising the burglary." *Gray*,728 So. 2d at 70-71 (¶173-74).

¶15. In requiring the inclusion of the element "without consent" in *Peterson*, and by requiring the essential elements of burglary as a predicate felony for murder in *Gray*, our supreme court relied on the rationale that such a requirement was the only manner in which the defendant's right to properly prepare a defense could be protected. We can surmise of no just cause why the protections afforded a defendant charged with sexual battery as a predicate felony for murder may be less stringent than those given when a defendant is merely charged with the crime of sexual battery alone. We reverse the judgment of the trial court, and expand the requirements for predicate felonies in *Gray* to include the crime of sexual battery.

## II. Whether Fuqua was prevented from developing testimony in support of theories of defense.

¶16. The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Yoste v. Wal-Mart Stores, Inc.*, 822 So. 2d 935, 936 (¶7) (Miss. 2002). Fuqua asserts that he was prevented from developing several theories of defense including: accidental death during consensual rough sex, the theory that Ainsworth's death was a result of his own negligence, the defense of duress at the hands of his co-defendant Albert Pitts, and the lesser offense of

manslaughter by culpable negligence. Fuqua further argues that while the inability to prevent each defense on its own may not constitute reversible error, the cumulative prejudice warrants reversal. *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990).

¶17. The State filed a motion in limine to exclude evidence of sexual relations between Ainsworth and Fuqua prior to February 16, 2002 pursuant to M.R.E. 412. The court found that evidence of sexual behavior prior to February 16, 2002, was not relevant. Fuqua argues that past sexual battery is a continuing episodic event such as child abuse. Consensual sex between adults on prior occasions is certainly not, by any stretch of the imagination, comparable to episodic child abuse. All that was relevant regarding sexual relations at this trial was whether the victim consented to the shocking abuses visited upon him on February 16, 2002. The trial court further found that, even if instances of prior sex had been relevant, the court could have excluded the evidence as overly prejudicial under M.R.E. 403. We find no error in the record that would indicate the decisions of the trial court constitute an abuse of discretion, and are left only to affirm the judgment of the trial court as to this issue.

### III. Whether the trial court erred in disallowing Fuqua's duress defense jury instruction.

¶18. Fuqua next argues that the trial court erred in refusing his duress jury instruction. Longstanding Mississippi law holds that duress is not a legal defense to murder. *Watson v. State*, 212 Miss. 788, 793, 55 So. 2d 441, 443 (1951). "A person is not authorized to take the life of another person at the command of a third person, whether he is in fear of such person or not . . . . " *Wilson v. State*, 390 So. 2d 575, 576 (Miss. 1980). Assuming *arguendo* that duress were a defense, there was no evidence at trial to support a finding that Fuqua's death or serious bodily injury was imminent, nor that he had not negligently placed himself in such a situation. *See Lester*

*v. State*, 767 So. 2d 219, 224 (¶18) (Miss. Ct. App. 2000). Finding no error we affirm the trial court's judgment on this issue.

### IV. Whether Fuqua was impermissibly prejudiced by the admission of irrelevant evidence.

¶19. Fuqua next alleges that the trial court erred in allowing the admission of a homemade glass shank. When law enforcement searched Fuqua's apartment, blood spatters were found near the couch and bed. Pursuant to this search, detectives found and recovered a metal pipe, a hammer, a toy duck with a red stain on it, and the homemade shank. Fuqua objected at trial to the admission of the shank on the grounds that it was both irrelevant and prejudicial. The shank was admitted into evidence as "harmless evidence" despite the lack of any blood having been found on the item, nor any testimony that it was utilized on Charles Ainsworth.

¶20. Fuqua now asserts that the shank was prejudicial as having a tendency to show that Fuqua entertained a propensity for violence and that it could have led jurors to believe that Fuqua had spent time in prison. Fuqua theorizes by analogy that allowing the shank into evidence as "harmless" evidence is akin to the court ruling that a live hand grenade is an innocuous utilitarian object, such as a paper weight, with no prejudicial implication linked to it. Under M.R.E. 401, "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Furthermore, after determining that a article of evidence is relevant under M.R.E. 401, it is incumbent upon the trial court to apply the balancing test of M.R.E. 403 which states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶21. In *Wade v. State*, the defendant was charged with the sexual battery of a ten-year-old child. *Wade v. State*, 583 So. 2d 965, 966 (Miss. 1991). At trial the child witnesses testified that they were shown a pornographic book before the sexual battery took place. *Wade*, 583 So. 2d at 966. The prosecution, over the objections of defense counsel, succeeded in obtaining the admission into evidence of a bag found in the defendant's car, that contained pictures of nude people engaged in various heterosexual and homosexual acts. *Id.* On appeal the Mississippi Supreme Court stated that the admission of the bag of pictures into evidence was in error as "neither of the two child witnesses testified that they saw, or were shown, the bag of pictures," and that "the bag had no probative value as to whether the children were shown pictures in the book, or whether they discovered the book themselves." *Id.* at 967. The *Wade* court went on to state that the admission of the bag constituted prejudicial error as "the jurors may have concluded that because the defendant collected the pictures, he did, in fact, sexually batter L.W." *Id.*

¶22. The State argues that the shank was merely one of many tools or weapons found near the scene of the crime, and as previous cases hold, was properly admitted into evidence. "This is true even where the evidence has probative weight, or where they constitute a part of the surrounding scene or picture, or are part of the circumstances of the arrest." *Wilkins v. State*, 264 So. 2d 411, 413 (Miss. 1972). In *Wilkins*, the defendant appealed his conviction for burglary, arguing that the admission of an axe and other burglary tools found about one hundred feet from the crime scene constituted reversible error. *Wilkins*, 264 So. 2d at 412. In affirming the admission of the burglary tools, the Mississippi Supreme Court did state that it "has been said that, as a general rule, burglary tools may be introduced and received in evidence only after proof is made connecting the tools with the accused or the crime. *Id.* at 413. In *Wilkins* there was at least some testimony that the axe, or at least some axe, had been used in the commission of the crime.

¶23. In the case *sub judice*, in which the charge involves sexual battery just as in *Wade*, we note that, unlike the pipe and hammer, there was no testimony at trial to link the shank to the *res gestae* of the crime or that the knife was utilized in the sexual battery itself. In light of the evidence of other weapons and the cause of death introduced at trial, it is hard to fathom a non-prejudicial reason for the introduction of the shank as "harmless evidence." Therefore, we find that the shank was not relevant to the crime merely by the fact that it was found at the scene, and that its introduction into evidence constituted reversible error in accordance with *Wilkins.*

**V. Whether the verdict of guilty of capital murder, as opposed to manslaughter, is supported by the evidence.**

¶24. Fuqua next asserts that the verdict of guilty of capital murder is unsupported by the evidence. Fuqua reasons that all of the witnesses testified that the sex was consensual and that therefore no sexual battery took place to provide the predicate for capital murder. Fuqua argues that, at most, the only conviction that could arguably be said to be supported by the evidence is manslaughter as provided in Mississippi Code Annotated §97-3-35 (Rev. 2000). In reviewing a challenge to the sufficiency of the evidence, this court is allowed to set aside the jury's verdict only if we are convinced that, as to one of the essential elements of the crime, the State's proof was so deficient that a reasonable and fair-minded juror could only find the defendant not guilty. *Byars v. State,* 835 So. 2d 965, 970 (¶13) (Miss. Ct. App. 2003).

¶25. Manslaughter is defined by statute in Mississippi Code Annotated § 97-3-35 as follows: "The killing of a human being, without malice, in the heat of passion, but in a cruel and unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter." Furthermore, culpable negligence manslaughter is defined in Mississippi Code Annotated § 97-3-47 (Rev. 2000) as, "Every other killing of a human being by the act, procurement, or culpable negligence of another and without authority of law, not provided for in this

title, shall be manslaughter." "Culpable negligence has been further defined judicially as 'negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life.'" *Steele v. State*, 852 So.2d 78, 80 (¶9) (Miss. Ct. App. 2003) (citing *Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995)).

¶26. Fuqua argues that the facts *sub judice* are analogous to the facts of an accidental shooting death in *Tait v. State*, 669 So.2d 85 (Miss. 1996). In *Tait*, the defendant was convicted of depraved heart murder and appealed on the grounds that the weight and sufficiency of the evidence should have lead only to a conviction for manslaughter by culpable negligence. *Tait*, 669 So. 2d at 87-88. The defendant and victim in *Tait* were engaged in horseplay involving a revolver. When the defendant put the gun to the victim's head, it accidentally discharged, killing the victim. *Id.* The Mississippi Supreme Court ruled that the only proper verdict supported by the evidence was manslaughter by culpable negligence. *Id.* at 90.

¶27. In overturning the conviction for murder the court relied on the following construction of depraved heart murder as applied to the facts of the case:

> a reckless and eminently dangerous act directed towards a single individual' would seem to include the defendant's act of pointing a gun at the victim and pulling the trigger. However, when looking at cases which have discussed depraved heart murder, the closest factually is *Blanks v. State*, *supra*. Even though the defendant in *Blanks* was convicted of manslaughter, this Court said it was proper for the jury to be instructed as to depraved heart murder because the defendant's conduct following the shooting when he dumped the body and his initial statements in which he denied the killing was not consistent with an accidental killing. *Blanks*, 547 So.2d at 33-35. The present case is distinguishable from *Blanks* because Tait's conduct of falling to the ground and crying following the shooting could be considered as consistent with an accident.

*Tait*, 669 So. 2d at 90 (distinguishing *Blanks v. State*, 547 So.2d 29 (Miss. 1989)). It is Fuqua's assertion that the dangerous horseplay in *Tait* is analogous to the violent alleged consensual sex in the case before us today.

¶28. The State argues that there was ample evidence that would allow a hypothetical juror, acting in good faith, to have found that Fuqua was in the commission of sexual battery when he killed Ainsworth. For instance, testimony from Janice Taylor, an eyewitness, was given regarding whether the oral sex had become non-consensual. She stated, "Yes, as far as beating him when he didn't. But, you know, this isn't the first time that ever happened." Furthermore, testimony bore out that Ainsworth was beaten so severely, that his head swelled up "like a pumpkin" and that Ainsworth was so battered that he could not open his mouth. In *Steele v. State*, the defendant was convicted of depraved heart murder for shooting into an unoccupied vehicle. *Steele v. State*, 852 So. 2d 78, 79 (¶1) (Miss. Ct. App. 2003). Steele argued on appeal, as Fuqua does, that he lacked the requisite malice to sustain a murder conviction. *Steele*, 852 So. 2d at 80 (¶9). The defendant in *Steele* argued, again just as Fuqua does, that *Tait v. State* provided controlling law. The court distinguished *Tait* as follows:

> *Tait* is distinguishable from Steele's circumstances on several fronts, most notably the absence of accident. Indeed, under *Windham*, the proper guiding principle is not whether the killing was unintentional or accidental; rather, it is the degree of recklessness employed by the defendant. *See* Michael J. Hoffheimer, "Murder and Manslaughter in Mississippi: Unintentional Killings," 71 MISS. L.J. 35, 117 (2001). That degree of recklessness can be reconciled in the cases by resolving the question of the defendant's intent as to the underlying act (*i.e.*, the shooting), rather than the intent to the killing. In each of the previously cited cases, the killing was unintentional. However, in cases involving shootings, the courts have consistently upheld convictions of depraved heart murder where the evidence suggested that the firing of the weapon was intentional, not accidental. *See, e.g.*, *Turner v. State*, 796 So. 2d 998 (Miss. 2001); *Evans v. State*, 797 So. 2d 811 (Miss. 2000); *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

*Steele*, 852 So. 2d at 80-81 (citing *Windham v. State*, 602 So. 2d 798, 801 (Miss. 1992)). After reviewing the evidence, the court ruled that there was no evidence that Steele did not intend to shoot, and that accordingly, the court could not find that murder was not an appropriate verdict. *Id.* at 81.

¶29. After reviewing the evidence in the record before us, it is clear that Fuqua intended to beat Ainsworth just as the defendant in *Steele* intended to shoot at an occupied vehicle. Furthermore, Fuqua's reliance on *Tait* is ironic in that the case itself directs this Court to distinguish the facts *sub judice* from those in *Tait.* The court in *Tait,* in holding that the evidence supported manslaughter by culpable negligence, distinguished the facts of the case before it from those in *Blanks,* where the defendant moved and dumped the victim's body. The facts surrounding Ainsworth's death, whereby Fuqua intended to severely beat the victim, and then moved and burned the body, are much more analogous to the facts found in *Blanks*. We therefore must affirm this assignment of error.

**VI. Whether the defendant was illegally sentenced as a habitual offender.**

¶30. Fuqua's final assignment of error alleges that, by failing to enter an order amending the indictment to charge Fuqua as a habitual offender, the amendment by the State at trial is ineffective and may not be used in sentencing. "The State is required to make sure that such an order appears in the record and the defense is required to object to the absence of such order if it wishes to preserve this point for appeal." *Reed v. State*, 506 So. 2d 277, 279 (Miss. 1987). Due to Fuqua's failure to object at trial, this issue is procedurally barred.

**¶31. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED AS TO ISSUES I AND IV AND AFFIRMED AS TO ISSUES II, III, V, AND VI. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.**

**KING, C.J., BRIDGES, P.J., CHANDLER AND BARNES, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., MYERS AND GRIFFIS, JJ.**

**IRVING, J., DISSENTING:**

¶32. The majority finds that count one of the indictment, which charges Leon Fuqua with felony murder and arson, is fatally defective because it fails to charge an element of the underlying felony and that this defect requires reversal. The majority also finds that the trial court erroneously

admitted a homemade shank (knife) and that this error also requires reversal. I agree that the shank was erroneously admitted, but on the facts of this case, I find that admission to be harmless error. I find no inadequacy of count one of the indictment. Therefore, I respectfully dissent.

¶33. The underlying felony charged in Fuqua's indictment is sexual battery. A person is guilty of sexual battery if he engages in sexual penetration with another person without the other's consent. Miss. Code Ann. § 97-3-95 (Rev. 2000). The majority finds that the indictment failed to charge the critical element that the sexual penetration occurred without the consent of the victim. I disagree; therefore, I respectfully dissent.

¶34. Count one of Fuqua indictment reads:

> Albert Lee Pitts, Jr. and Leon Fuqua individually or while aiding and abetting and/or acting in concert with each other in said District, County and State, on or about the 16 day of February, 2002, without authority of law, and with or without any design to effect the death, did then and there wilfully, unlawfully, and feloniously, kill, slay, and murder Ray Charles Ainsworth, a human being, in violation of Section 97-3-19-(2)(e), Mississippi Code, 1972, as amended, while, the said Albert Lee Pitts, Jr. and Leon Fuqua, were engaged in commission of the crime of sexual battery of Ray Charles Ainsworth or in the attempt to commit such offense, by willfully, unlawfully and feloniously engaging in sexual penetration with Ray Charles in that, he the said Albert Lee Pits, Jr. and Leon Fuqua forced the victim, Ray Charles Ainsworth to perform fellatio on the said Albert Lee Pitts, Jr. and Leon Fuqua.

¶35. While it is true that the indictment does not use the statutory words, "without consent", it is abundantly clear to me that the indictment charges that the penetration occurred without the consent of the victim, Ray Charles. Mississippi Code Annotated section 97-3-97 (Rev. 2000) provides the following definition for sexual penetration: "'Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body."

¶36. I cannot comprehend the majority's finding that count one of this indictment, which charges that Fuqua *forced* Ray Charles Ainsworth to commit fellatio on him, is not tantamount to charging that Fuqua engaged in an act of sexual penetration with Ray Charles without Ray Charles's consent. Surely, if one is forced to commit an act, he has not consented to performing the act. Consequently, I dissent. I would affirm Fuqua's conviction and sentence.

**¶37. LEE, P.J., MYERS AND GRIFFIS, JJ., JOIN THIS SEPARATE WRITTEN OPINION.**